(12)

No. 91-542

In The

Supreme Court of the United States

October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, ET AL.,

Petitioners,

v.

FRANK ROBERT WEST, JR.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

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STATEMENT OF THE CASE

Respondent, Frank West, pled not guilty to a charge that on or about December 13, 1978, in Westmoreland County, Virginia, he feloniously took, stole, and carried away the property of Angelo F. Cardova with a value of $100 or more in violation of Va. Code Ann. § 18.2-95 (Michie 1975). J.A. 3. The testimony presented at trial indicated that Cardova owned a house in Westmoreland County, Virginia. J.A. 7. On the afternoon of December 13, 1978, Cardova locked and left the house. When he returned to the house on December 26, 1978, he discovered that $3500 worth of his property was missing. *Id.*

On January 10, 1979, sheriff's personnel searched West's home in Gloucester County, Virginia, and seized numerous items which they identified as reported stolen in Westmoreland County. J.A. 18. West was not at his home when the search was conducted. J.A. 17-18. Some time later in January, Cardova went to the sheriff's office and identified several items seized from West's home as $1100 worth of the property he previously reported stolen. J.A. 9-13.

The prosecution rested after it presented evidence to establish: (1) West's exclusive possession of the Cardova items found in Gloucester County; and (2) the chain of custody from the time the items were seized to the time they were identified by Cardova. West moved to strike the evidence for failure to prove that he was the "active agent" in the theft but the motion was denied. J.A. 18-19.

West testified that he bought several truckloads worth of merchandise at flea markets and then resold the items at different locations. J.A. 21. He acknowledged that many things bought at flea markets may be stolen, but denied being in Westmoreland County and stealing anything or breaking into any house. *Id.* West recalled purchasing several of the articles in question from Ronnie Elkins, who sold goods at flea markets. West remembered that sometime around January 1, 1979, he gave $500 to Elkins for all the items he bought. J.A. 23, 26. West

claimed that he was not able to produce Elkins as a witness because he did not know until the day of the trial what items he was charged with taking. J.A. 29.[1]

No rebuttal evidence was presented by the prosecution. West renewed the motion to strike, which was denied. J.A. 30. In closing argument to the jury, the defense pressed for acquittal because the prosecutor presented "no direct evidence whatsoever that [West] carried, himself, items out of the [Cardova] house." J.A. 30. The prosecutor, in his closing argument, responded that the jury should reject West's claim of innocence and that the "law in its wisdom in these circumstances allows the jury to draw" the inference that the possessor of recently stolen goods is the thief. Tr. 89-90.[2]

The jury found West guilty and sentenced him to ten years imprisonment. Tr. 93. He filed a petition for appeal on several grounds, including the sufficiency of the evidence to convict beyond a reasonable doubt. J.A. 38-40. On May 30, 1980, the Supreme Court of Virginia denied the petition, stating only that it found no reversible error. J.A. 41. In 1987, West secured an unsworn "affidavit" from Ronnie Elkins. The affidavit generally corroborated West's testimony that he purchased the Cardova items at flea markets and that many of the Cardova items came to West from Elkins. Pet. App. 21-22 n.9. West again sought relief in the state courts on the basis of the affidavit, the sufficiency of the evidence, and other claims. His petition for a writ of habeas corpus was summarily denied by the Virginia Supreme Court on May 13, 1988. J.A. 48.

West next filed a federal habeas petition pursuant to 28 U.S.C. § 2254 (1982). The district court denied relief. In pertinent part, it applied the standard enunciated by this

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[1] West was incarcerated when the items were taken from his house and the indictment did not specify the items that were taken from Cardova. Pet. App. 19.

[2] "Tr." refers to the trial transcript in *Commonwealth v. West*, dated June 21, 1979. This transcript is part of the original record in this case.

Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), and concluded that a rational juror could find beyond a reasonable doubt that West was guilty of grand larceny. Pet. App. 28.

On appeal, the court of appeals reversed. It rejected threshold claims that the *Jackson* issue was not raised in state court and that relief was, in any event, barred under the "new rule" restriction of *Teague v. Lane*, 489 U.S. 288, 310 (1989). Pet. App. 8-10.

The court of appeals then reached the merits of West's claim that the prosecution had not proved an essential element of the crime with which he was charged, namely, his participation in the Westmoreland County theft that occurred on or about December 13, 1978. It focused on the question of whether the unexplained possession of some of the stolen items, without any evidence linking West to the scene of the theft, was enough evidence to convince any rational juror beyond a reasonable doubt that West committed the theft. Pet. App. 14. The court of appeals acknowledged the existence of the common law rule that possession of stolen goods in these circumstances raises a permissive inference that the possessor is also the thief. Pet. App. 11. Nevertheless, giving due weight to the inference, it concluded that the evidence, even when viewed in the light most favorable to the prosecution, could not convince any rational juror that West was guilty as charged. Pet. App. 20.[3]

The court of appeals recognized that:

> [T]here may be no more delicate constitutional determination in federal collateral review, given its unique rejection not only of state judicial rulings but of state jury findings. Aware of its

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[3] The United States points out that the writ was granted many years after West was convicted. Br. U.S. 22. Though this is true, no claim of prejudicial delay has ever been raised by the petitioners under Rule 9(a) of the Rules Governing § 2254 Cases. Moreover, West appears to have promptly pressed his request for collateral review after he obtained the "affidavit" from Elkins in 1987.

> special delicacy when viewed in this stark way, we nevertheless have felt obliged under the constitutional test we apply to make that determination here.

Pet. App. 20-21. The court emphasized that it was making a case-specific ruling which did not preclude the continued, and presumably frequent, use of the inference in Virginia. *Id.*

SUMMARY OF THE ARGUMENT

1. This case presents a sufficiency-of-the-evidence claim that requires the Court to apply settled legal principles to the facts in order to determine whether respondent's conviction violates due process. Resolution of this case in respondent's favor would not violate the *Teague* retroactivity doctrine. *Teague v. Lane*, 489 U.S. 288 (1989) (plurality). *Teague* is not implicated because habeas review of sufficiency challenges under federal due process standards had already been settled by *Jackson v. Virginia*, 443 U.S. 307 (1979), before respondent's conviction became final in 1980. Equally well settled at that time was the principle that a permissive inference, standing alone, could not sustain a conviction unless the evidence giving rise to it proved each element of the crime beyond a reasonable doubt. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979). Because the court of appeals merely applied these settled principles, its decision did not announce or apply a new rule of law, and the grant of the writ is not barred by *Teague*.

2. Respondent's sufficiency claim is not procedurally defaulted as petitioners suggest. At trial, West repeatedly moved to dismiss the case, arguing that the evidence was insufficient as a matter of law to prove that he was guilty as charged. On appeal, West again argued that Virginia had failed to prove his guilt beyond a reasonable doubt. As petitioners themselves conceded in district court, once West's sufficiency challenge was rejected by the state courts, he had exhausted state court remedies and was eligible to seek *Jackson* relief in a

habeas proceeding. Respondent's direct challenge to the sufficiency of the evidence did not require that he also challenge the constitutionality of the inference instruction.

3. In light of settled due process standards, no rational juror could have found beyond a reasonable doubt that West committed the larceny in Westmoreland County as charged. Virginia prosecuted West exclusively on the theory that he committed the theft; other theories of larceny, such as receiving stolen goods, were not submitted to the jury. The jury had no direct evidence that West participated in the theft. Instead, it was left to rely exclusively upon the common law permissive inference that a person in the unexplained possession of recently stolen property is the thief. Thus, under *Ulster County Court*, this inference had to prove beyond a reasonable doubt that West committed the theft.

Historically, unexplained possession of stolen property, without more, has not necessarily revealed how the possessor obtained the property; the inference flowing from such possession cannot distinguish between those who stole the goods and those who merely received the goods. Therefore, West's possession of stolen items in Gloucester County, standing alone, was inadequate to prove that he stole them in Westmoreland County some two weeks earlier. Nor does the jury's rejection of West's testimony provide additional, much less conclusive, proof that he was the thief.

The decision below does not threaten the continued use of the common law inference by Virginia or any other state. The court of appeals merely held that the circumstances of West's possession of stolen goods, unilluminated by other inculpatory facts, was insufficient to prove guilt of larceny as charged. Because exclusive reliance on the inference to prove guilt is rare, and the ruling below is narrowly tailored to the facts of West's case, the court of appeals' decision is of little importance to other cases where the inference is invoked.

4. In response to the Court's question of whether a habeas court should give deferential or *de novo* review to a state court's application of law to a specific set of facts, respondent suggests three reasons why the answer must be *de novo* review: (1) the controlling statute so provides; (2) the separation of powers doctrine requires Congress to decide whether to alter the existing *de novo* standard; and (3) stare decisis compels this Court to respect forty years of unwavering precedent applying *de novo* review to mixed questions.

In 28 U.S.C. § 2254, Congress provided for a federal remedy for state prisoners who allege they are in custody pursuant to state court judgments in violation of their constitutional rights. The statute provides for plenary review of all but state court factual findings, which are presumptively correct under the terms of § 2254(d).

The separation of powers doctrine grants Congress the prerogative to decide whether alteration of the standard of habeas review is warranted. Past and present activity by Congress demonstrates its consistent interest in retaining control of this fundamental determination. The question whether state convictions will be subject to independent federal review is a political issue which can only be determined by the legislature.

The principles of stare decisis mandate the continued use of the *de novo* standard for mixed questions. At least since *Brown v. Allen*, 344 U.S. 443 (1953), this Court has consistently instructed habeas courts to apply the *de novo* standard when reviewing state courts' constitutional rulings on mixed questions. Of particular significance here, the Court in *Jackson v. Virginia* recognized this standard as appropriate for reviewing sufficiency challenges. Any alteration of the standard of review in this case would derogate from these fundamental principles. There is no compelling reason to redetermine this settled question.

5. Finally, the Court's retroactivity decisions in *Teague, Butler v. McKellar*, 494 U.S. 407 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990), are consistent with the statutory requirement of *de novo* review for mixed questions.

Teague requires habeas courts to refrain from the retroactive application of new rules in order to prevent the disparate treatment of similarly situated defendants. Neither *Teague* nor its progeny diminish the power of the habeas court to conduct plenary review of habeas petitions.

Furthermore, increased deference to state court decisions would be problematic for two reasons. First, the federal courts would face the difficult task of determining how the state court's decisions were reached and whether the decisions are entitled to deference. Second, increased deference to state court decision-making may result in the disparate treatment of similarly situated litigants that *Teague* sought to avoid.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ANNOUNCE OR APPLY A NEW RULE OF CRIMINAL PROCEDURE WHEN IT GRANTED RELIEF.

This Court prohibits the retroactive application of new rules of criminal procedure on habeas review. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality). New rules are broadly defined in *Teague* as follows:

> [A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (citations omitted).

Later cases have refined this concept. "Dictated by precedent" does not mean that the rule applied by the habeas court is simply within the "logical compass" or "controlled" by existing precedent. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Rather, the rule applied by the habeas court must be "compelled" by the precedent that existed when the conviction became final in the state

courts. *Sawyer v. Smith*, 110 S. Ct. 2822, 2828 (1990). "The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions [that were] valid when entered." *Sawyer*, 110 S. Ct. at 2827.

The court of appeals did not announce a new rule when it determined that the evidence presented at West's trial could not convince any rational juror beyond a reasonable doubt that Frank West committed a theft in Westmoreland County, Virginia on or about December 13, 1978. Rather, this determination was compelled by the precedent that existed before West's conviction was finalized in 1980.[4] By the end of 1979, this Court had already established that state convictions were subject to habeas review to determine if the evidence was sufficient to prove guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (making sufficiency claims cognizable on habeas review). Other cases made it clear that a state's reliance on a statutory or common law permissive inference as part of its proof did not resolve the separate question of whether the evidence was sufficient. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 165-67 (1979) (recognizing that common law and statutory permissive inferences are "one not necessarily sufficient part of the [prosecution's] proof," and that if no other evidence is presented, evidence giving rise to the inference must establish guilt beyond a reasonable doubt); *Barnes v. United States*, 412 U.S. 837, 843 (1973) (rejecting a due process challenge to a jury instruction

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[4] Respondent here addresses *Teague* as a rule defining retroactive application of law. Respondent discusses petitioners' more sweeping assertion, that *Teague* abolished *de novo* review in habeas proceedings, Br. Pet. 11, *post* p. 44. In light of this assertion, petitioners do not appear to be pressing the *Teague* retroactivity claim they pursued in the court of appeals. Pet. App. 10. They now acknowledge that the ruling by the court of appeals did not announce a new rule regarding the constitutionality of the inference. Br. Pet. 27-28 n.15.

that unexplained possession of recently stolen checks permits inference that possessor knew checks were stolen because evidence giving rise to the inference satisfied the beyond-a-reasonable-doubt standard); *United States v. Gainey*, 380 U.S. 63, 68 (1965) (statutory permissive inference that presence at an illegal still is sufficient to convict under 26 U.S.C. § 5601 does not preclude trial court from granting directed verdict or motion j.n.o.v.).[5]

Thus, this Court's precedent as of 1979 compelled the court of appeals to determine whether the evidence presented in this case would permit any rational juror to find respondent guilty beyond a reasonable doubt.[6] Given the settled state of federal law, the new rule principle did not prohibit a ruling that the evidence in this case was insufficient, even if state law held otherwise. *See Sawyer*, 110 S. Ct. at 2830 ("Federal habeas corpus serves to ensure that state convictions comport with the federal law that was

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[5] These cases are discussed in more detail in argument III of this brief, *post* pp. 16-21.

[6] The only other circuit to address this type of sufficiency issue, raised on habeas review, recognized that *Ulster County Court* and *Jackson v. Virginia* compelled the type of case-by-case review conducted by the court of appeals in this case. *Cosby v. Jones*, 682 F.2d 1373, 1379-80 (11th Cir. 1982). Several state supreme courts also recognized the significance of *Ulster County Court* for sufficiency claims where the prosecution relied on an inference to prove a necessary element of its case. *See, e.g., Bankston v. State*, 309 S.E.2d 369, 370 (Ga. 1983) (citing *Ulster County Court* and holding that despite the state's long use of the inference, the sole evidence of "recent, unexplained possession is not automatically sufficient to support a conviction for burglary"); *People v. Housby*, 403 N.E.2d 62, 64 (Ill. App. Ct. 1980) (citing *Ulster County Court* and noting that unexplained possession of recently stolen property, without corroborating evidence, is insufficient to convict for burglary), *aff'd*, 420 N.E.2d 151 (Ill.), *cert. denied*, 454 U.S. 845 (1981); *Bellamy v. State*, 742 S.W.2d 677, 682, 684-85 (Tex. Crim. App. 1987) (citing *Ulster County Court* and holding that although the failure of a second-hand dealer to record a purchase of goods is "admissible, *tending* to show appellant was aware he was dealing in stolen goods," where "nothing in the facts [existed] . . . to shore up the particular inference . . . ," the inference was unconstitutional as applied to the appellant).

established at the time the petitioner's conviction became final.").

Nor does application of settled principles to a new set of facts, as was done here, violate *Teague*.[7] West is entitled to application of the settled rule that due process requires case-by-case review to determine whether the state proved each element of the crime beyond a reasonable doubt. As the court of appeals noted:

> Obviously, a federal habeas court cannot be said to apply a "new constitutional rule" whenever it applies the *Jackson v. Virginia* test to a "new" set of facts in evidence.

Pet. App. 10.[8]

II. THE *JACKSON v. VIRGINIA* SUFFICIENCY ISSUE WAS NOT PROCEDURALLY DEFAULTED IN THE VIRGINIA COURTS.

Petitioners insist the sufficiency issue was procedurally defaulted because West did not challenge the vitality of the inference in state court. Br. Pet. 27. This claim is incorrect. West repeatedly objected that the evidence was insufficient to prove he was the thief. Pet.

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[7] *Yates v. Aiken*, 484 U.S. 211, 216 (1988) ("many 'new' holdings are merely applications of principles that were well settled at the time of conviction"); *see also Francis v. Franklin*, 471 U.S. 307, 326 (1985) (applying principle that governed earlier decision). Lower federal courts have recently concluded that decisions from this Court may be applications of settled precedent and not new rules. *See, e.g., Harris v. Vasquez*, 949 F.2d 1497, 1512 (9th Cir. 1990) (holding that *McCleskey v. Zant*, 111 S. Ct. 1454 (1991) defined the doctrine of abuse of the writ with more precision than before but was not a new rule), *petition for cert. filed*, No. 91-6990 (Jan. 14, 1992).

[8] It is clear that the court of appeals was concerned with its responsibility to impose no new obligation on the Commonwealth of Virginia. Pet. App. 21. The court therefore did not announce any new rule regarding the continued use of the inference: "we hold only that the specific evidence used to invoke the inference of guilt *here* failed to meet the beyond-a-reasonable-doubt test of *Jackson v. Virginia*." Pet. App. 21 (footnote omitted) (emphasis added).

App. 5. Though West made no objection to the common law inference instruction, the court of appeals agreed that "[t]hroughout, his challenge has been to the sufficiency of the evidence to take the case to the jury under any jury instructions." Pet. App. 7. West's state court claim, once rejected, exhausted the state remedies available to test the sufficiency of the evidence. The court of appeals thus concluded that West was entitled to bring his due process claim in a federal habeas action. Pet. App. 8-9.[9]

The court of appeals' analysis is undoubtedly correct. First, when West's counsel moved to strike the evidence at the close of the state's case, he stated:

> I have heard no evidence whatsoever to show that Frank West was the person who collected these items and carried them off. There have been no witnesses, no single bit of evidence presented as to him taking the stuff off the premises of Mr. Cardova.
>
> The larceny has not been shown, because he has not been shown to be the active agent that did this.

J.A. 19. The motion to strike was renewed at the close of the defense, J.A. 30, repeated to the jury in closing argument, J.A. 30-31, and renewed again after the verdict was returned. J.A. 36.

On appeal, West again claimed that Virginia did not prove his guilt beyond a reasonable doubt, stressing that "there is not one shred of evidence which places the defendant anywhere near the scene of the alleged crime." J.A. 40. West then directly challenged the adequacy of the inference to prove guilt *in this case*: "Because there was no other evidence at all to connect the defendant to the crime, we suggest that a rebutted inference of guilt is not

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[9] The United States is wrong to suggest that respondent recast his claim as a sufficiency challenge to avoid *Teague* problems that would have been occasioned by a more direct challenge to the common law inference. Br. U.S. 17. West has consistently confined his challenge to the sufficiency of the evidence to convict him in this case.

sufficient to meet the standard of proof required of the Commonwealth, that a reasonable doubt must certainly exist. . . . " *Id.*[10] Thus, West challenged the sufficiency of the evidence to prove a necessary element of the crime charged, and this Court in *Jackson* recognized that such a challenge raised a federal claim:

> Under the *Winship* decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim.

Jackson, 443 U.S. at 321.

Finally, the petitioners conceded in district court that respondent's claim concerning sufficiency of the evidence was exhausted; they defended in district court on the basis that a rational juror could have found that West was guilty of larceny. J.A. 52-54. That concession precludes invocation of procedural default on appeal.[11]

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[10] As petitioners note, West did claim on appeal that his testimony rebutted the inference. That claim, however, did not alter or diminish his oft-repeated argument that the evidence presented did not establish his guilt of the crime charged beyond a reasonable doubt. Indeed, West moved to strike the evidence even before he testified, claiming that the inference from unexplained possession was inadequate to allow the case to proceed any further. J.A. 18-19. When fairly read, West's state court claims include the issue raised in the district court, the court of appeals and here. The court of appeals properly relied on *Picard v. Connor*, 404 U.S. 270, 278 (1971) ("substance of a federal habeas corpus claim must first be presented to the state courts"), for the proposition that West was not required to cite "book and verse on the federal constitution." Pet. App. 9. *See also Hawkins v. West*, 706 F.2d 437, 439 (2d Cir. 1983) (defendant's allegation that "[t]he prosecution's case fell quite short of that required to prove appellant's guilt beyond a reasonable doubt" properly alerted the state court to a due process right guaranteed by the federal Constitution).

[11] *See Reese v. Nix*, 942 F.2d 1276, 1280 (8th Cir. 1991) (upholding district court ruling that warden waived procedural defense because he failed to affirmatively assert it in his answer to the habeas petition), *cert. denied*, 1991 WL 284583 (Feb. 24, 1992).

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III. NO RATIONAL JUROR COULD FIND BEYOND A REASONABLE DOUBT THAT WEST COMMITTED THE CRIME WITH WHICH HE WAS CHARGED, AND THE COURT OF APPEALS WAS COMPELLED TO GRANT HABEAS RELIEF UNDER *JACKSON v. VIRGINIA*.

A. *Virginia Relied on the Common Law Inference Arising from the Unexplained Possession of Recently Stolen Goods to Prove that West Committed a Theft Weeks Earlier in Another County of Virginia.*

The sufficiency analysis of *Jackson v. Virginia*, 443 U.S. 307, 319, 324 n.16 (1979), requires the habeas court to determine whether any rational juror could find beyond a reasonable doubt the elements of the crime charged as defined by state law. In this case, respondent was charged by indictment as follows:

> Frank Robert West, Jr., on or about the 13th day of December, in the year of one thousand nine hundred and seventy-eight, and in [Westmoreland] County, did feloniously . . . take, steal, and carry away the property of Angelo F. Cordova [sic] having a value of $100 or more, in violation of Section 18.2-95 of the Code of Virginia of 1950. . . . [12]

J.A. 3.

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A finding of a waiver of the default claim is not inconsistent with *Granberry v. Greer*, 481 U.S. 129 (1987). There, this Court held that an exhaustion claim could be raised by the state for the first time on appeal and the court of appeals could decide whether to proceed by balancing the competing interests of the parties. Here, however, exhaustion was raised for the first time in the district court when it was conceded by petitioners. Petitioners should be held to that concession.

[12] Section 18.2-95, in pertinent part, defines grand larceny generally – "Any person who . . . [c]ommits simple larceny not from the person of another of goods and chattels of the value of $200 or more, shall be deemed guilty of grand larceny" – and sets forth the punishment. Va.

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Though Virginia could have requested an instruction on the lesser included offense of larceny by receiving stolen goods, *Cabbler v. Commonwealth*, 184 S.E.2d 781, 783-84 (Va. 1971) (receiving stolen goods is a lesser included offense of larceny and chargeable as larceny), *cert. denied*, 405 U.S. 1073 (1972), such an instruction was not given to the jury.[13] Rather, the trial court instructed the jury to convict "[i]f you believe from the evidence beyond a reasonable doubt that [West] took and carried away . . . the property of Angelo F. Cordova [sic], as charged in the indictment. . . ." J.A. 33. Thus, Virginia committed itself to proving beyond a reasonable doubt that West was a participant in the Westmoreland County theft.[14] *See Mitchell v. Commonwealth*, 127 S.E. 368, 374 (Va. 1925) ("The offense as charged must be proved.").

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Code Ann. § 18.2-95 (Michie 1988). Although regulated by statute, grand larceny is a common law crime in Virginia. *Smith v. Cox*, 435 F.2d 453, 457 (4th Cir. 1970), *vacated on other grounds*, 404 U.S. 53 (1971). Virginia courts define it as "the wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently." *Skeeter v. Commonwealth*, 232 S.E.2d 756, 758 (Va. 1977).

[13] Receiving stolen goods is separately defined under Va. Code Ann. § 18.2-108 (Michie 1988), which provides: "If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted."

[14] This point was undisputed at trial. In closing argument, defense counsel noted:

> I have not heard [anyone] testify, nor can they say it was Frank West I saw in the house or it was Frank West I saw come out of the house with the goods. There has been no such testimony, and when you, ladies and gentlemen of the jury, read the elements of the offense as charged in the Bill of Indictment, and you weigh the evidence before you, I believe that it has not been shown beyond any reasonable doubt that [West] was

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At trial, the prosecution presented no evidence which placed West in Westmoreland County or at the Cardova house at any time. Nor was any other link between West and Cardova or Westmoreland County established. Instead, the prosecution relied exclusively upon Virginia's common law inference that one in the possession of recently stolen property is himself the thief, unless he explains his possession to the satisfaction of the jury.[15] The bare facts giving rise to this permissive inference comprised the only evidence presented against West to prove the charge: namely, (1) the fact that certain property, valued at $3500, was stolen from the Cardova house in Westmoreland County between December 13 and December 26, 1978 (J.A. 6-16); (2) some of the stolen items, valued at $1100, were discovered in West's exclusive possession in Gloucester County on January 10, 1979 (J.A. 16-19);[16] and (3) West's possession was unexplained

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> the one that went into that house and who carried the goods away.

Tr. 88. The prosecutor did not dispute the lack of direct evidence. He argued, however, that "it is precisely [because] of the problems that [defense counsel] has cited" that the law holds a defendant's unexplained or falsely denied possession of recently stolen goods "sufficient to raise an inference that the defendant was the thief." Tr. 89.

[15] In Virginia, the unexplained possession of recently stolen property may also give rise to an inference of receiving stolen goods with guilty knowledge, *Westcott v. Commonwealth*, 216 S.E.2d 60, 64 (Va. 1975), and, in certain circumstances, burglary, *Sullivan v. Commonwealth*, 169 S.E.2d 577, 579 (Va. 1969), *cert. denied*, 397 U.S. 998 (1970). The court of appeals noted the distinction between the inference of guilty knowledge and the weaker inference of participation in the theft which was relevant to this case. Pet. App. 12-13 n.5.

[16] For the first time in their brief on the merits, petitioners rely on West's testimony that he purchased the items "around January 1," J.A. 26, for the purpose of fixing the date of his acquisition of the goods. Br. Pet. 36 n.20. This testimony, however, does not conflict with the court of appeals' conclusion that "the theft from the Cardova's residence occurred sometime during a period of two to four weeks before some of the stolen items were

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in that the jury chose to disbelieve his account of acquiring the items. (J.A. 20-30).

The question for the court of appeals, in conducting the *Jackson* sufficiency analysis on habeas review, was whether this evidence, viewed in the light most favorable to the prosecution, could persuade any rational juror beyond a reasonable doubt that West participated in the Westmoreland County theft. The court of appeals found that it could not. Pet. App. 20.

B. *Under Federal Due Process Standards, the Inference Arising from Unexplained Possession of Recently Stolen Property Cannot be Deemed Sufficient to Prove Guilt Without a Consideration of the Underlying Facts Giving Rise to the Inference.*

Petitioners assert, for sufficiency-review purposes, an absolute right to rely upon the long-standing common law inference as proof of theft beyond a reasonable doubt without any examination of the facts giving rise to the inference in a particular case.[17] Br. Pet. 10, 35-37. Under

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found in West's possession" on January 10. Pet. App. 16 (emphasis added). Nor does this testimony affect the court of appeals' analysis. At best, Virginia established that the theft occurred no earlier than December 13 and West's possession commenced no later than "around January 1," some 19 days later. Thus, even accepting the January 1 date of acquisition, the evidence establishes no better than a 19-day span between the theft and West's possession. Petitioners attempt to shorten the time frame by referring to the day Cardova discovered the theft. This analysis is incorrect. That Cardova returned to his house on December 26 and discovered the theft does not fix the date of the crime any closer to the time West came into possession of the goods.

[17] Virginia courts also do not conduct a case-by-case assessment of the facts for determining the "recency" of a defendant's possession. Although Virginia recognizes that "recency" is a question of fact for the jury, Virginia courts have generally held that periods of up to three months are not too long to preclude a finding of recency as a matter of law, without engaging in an analysis of the facts of the particular case. *See, e.g.,*

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Virginia law, and in petitioners' understanding, a defendant's possession of recently stolen property, if unexplained or falsely denied, is always legally sufficient to support his conviction for theft. *See, e.g., Montgomery v. Commonwealth*, 269 S.E.2d 352, 353 (Va. 1980) ("Absent a credible, exculpatory explanation for defendant's possession of the stolen goods, the judge permissibly inferred that defendant had committed the larceny."). It was on the basis of this rule that the state courts and federal district court affirmed West's conviction. *See* Br. Pet. 7, 28-29; Pet. App. 27-28. Federal due process analysis, however, has long required a more focused review of sufficiency claims, based on the elements of the crime charged as defined by state law.

It is well settled now, as it was at the time this case was prosecuted in Virginia, that the Fourteenth Amendment requires the prosecution to prove its case beyond a reasonable doubt. In *In re Winship*, 397 U.S. 358, 364 (1970), this Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In *Patterson v. New York*, 432 U.S. 197, 210 (1977), the Court clarified the elements or facts to which the reasonable-doubt requirement applies: "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the non-existence of all affirmative defenses [is] never constitutionally . . . required."

Having thus established the reasonable-doubt standard as the measure of the prosecution's ultimate burden

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Montgomery v. Commonwealth, 269 S.E.2d 352, 353 (Va. 1980) ("Four weeks is not, as a matter of law, so long a time that goods may not be considered recently stolen."); *Sullivan v. Commonwealth*, 169 S.E.2d 577, 579 (Va. 1970) (two and one-half months); *Wilborne v. Commonwealth*, 28 S.E.2d 1, 2 (Va. 1943) (three months).

of proof at trial, the Court announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), the test for evaluating the prosecution's compliance with that standard on habeas review. In *Jackson*, the Court rejected the "no evidence" rule of *Thompson v. City of Louisville*, 362 U.S. 199 (1960), as an "inadequate" guide for a federal habeas corpus court to use in assessing a state prisoner's sufficiency challenge. *Jackson*, 443 U.S. at 320. The Court reasoned that the *Winship* doctrine, "establishing so fundamental a substantive constitutional standard[,] must also require that the factfinder will rationally apply that standard to the facts in evidence." *Jackson*, 443 U.S. at 317. Noting that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt," *id.*, the Court announced the analysis by which federal courts on habeas review are to ensure that the constitutional standard of *Winship* is rationally applied: "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. The *Jackson* analysis is to be "applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16.

The due process requirements enunciated in *Winship* and *Jackson* apply with equal force in cases where the state relies upon a permissive inference. In *Barnes v. United States*, 412 U.S. 837 (1973), the Court upheld an instruction which permitted the jury to infer guilty knowledge from the possession of recently stolen checks. Although the Court upheld the instruction, it noted that the burden of proving the essential element of guilty knowledge remained with the government. *Id.* at 845 n.9.

In *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 165-67 (1979), a habeas corpus case, the Court held that an instruction on the use of a common law or statutory permissive inference is consistent with due process so long as the inference satisfies the more-likely-than-not rationality test of *Leary v. United States*, 395 U.S. 6 (1969). That is, the instruction will be upheld if there is a rational connection between the basic facts that the prosecution proves and the ultimate fact presumed, and the latter is more likely than not to flow from the former. *Ulster County Court*, 442 U.S. at 165-67. The Court explained that the "more likely than not" test is appropriate for assessing the constitutionality of allowing the jury to draw the permissive inference because the inference serves as just "one *not necessarily sufficient* part of [the prosecution's] proof" and the "prosecution may rely on *all* the evidence in the record to meet the reasonable-doubt standard." *Id.* at 166-67 (emphasis added). "As long as it is clear that the presumption is *not the sole and sufficient basis* for a finding of guilt, it need only satisfy the test described in *Leary*." *Id.* at 167 (emphasis added). If the permissive inference constitutes the only basis for a finding of guilt, then presumably it must, in and of itself, establish that guilt beyond a reasonable doubt.

The *Ulster* Court recognized the distinction between the standard for allowing a permissive inference instruction at all and the independent question of whether the evidence, including the inference, was sufficient to convict. It held, in the case before it, that the permissive inference satisfied the more-likely-than-not test for purposes of a jury instruction, and it left undisturbed the separate finding by the state court that the evidence as a whole was sufficient to sustain the conviction. *Id.* at 167.[18]

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[18] The Court had recognized a similar point in *United States v. Gainey*, 380 U.S. 63 (1965), where it noted the distinction between the question of whether the permissive inference could be drawn and the independent question of whether the evidence was sufficient to convict. *Id.* at 68. ("But where the only evidence is [the bare facts giving rise to the inference,] the statut[ory inference] does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment notwithstanding the verdict. And the Court of Appeals may still review the trial judge's denial of motions for a directed verdict or for a judgment n.o.v.").

Of course, two weeks later in *Jackson v. Virginia*, the Court recognized the constitutional significance of the sufficiency question.

Petitioners seek to circumvent the federal constitutional standard by arguing that *Jackson* requires the habeas sufficiency inquiry to be gauged in light of applicable state law, which petitioners, in turn, define as Virginia's rule that the common law inference, when drawn by the jury, is legally sufficient to sustain a conviction of theft. Br. Pet. 31. *Jackson* considers state law controlling only to the extent that it defines the substantive elements of the crime. 443 U.S. at 324 n.16 ("[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law."). Under *Jackson*, however, the habeas court must still independently assess the sufficiency of the evidence. Virginia's rule that the inference arising from the possession of recently stolen property is necessarily and always sufficient to prove guilt of theft beyond a reasonable doubt is inadequate for measuring a due process claim under *Winship*, *Jackson*, and *Ulster County Court*.[19]

Thus, it is clear that the court of appeals applied the correct standard to test the sufficiency of the evidence to sustain West's conviction. It assumed that the inference of theft arising from the unexplained possession of recently stolen property satisfies the more-likely-than-not rationality test required for an instruction on the inference. Pet. App. 12. It noted, however, that in this case the bare facts giving rise to the permissive inference served as the *sole* basis for finding West guilty. *Id.* at 4, 7. Under *Ulster County Court*, this meant that the permissive inference, standing alone, had to prove West's guilt of participation

[19] Petitioners' claim that Virginia uses a more permissive review standard than that required by *Jackson*, Br. Pet. 26 n.14, ignores the effect of its law regarding the common law inference. If Virginia courts find the evidence to be sufficient, perforce, in every case in which the jury rejects the defendant's explanation and draws the inference, then Virginia has, in effect, no sufficiency review.

in the Westmoreland County theft beyond a reasonable doubt. *Id.* at 7-8. It was this issue which the court of appeals addressed independently of Virginia's rule that the inference proves guilt in all cases.

C. *The Evidence Presented at Trial Does Not Prove that West Participated in the Westmoreland County Theft.*

1. *The inference arising in this case from West's unexplained possession of recently stolen goods does not establish participation.*

The factual issue in this case is whether Virginia proved that West participated in the December theft in Westmoreland County. The inference arising from the unexplained possession of recently stolen property, which Virginia used to prove this element of participation, does not necessarily identify the nature of the possessor's guilt, *i.e.*, whether the possessor in fact stole the goods or received them with guilty knowledge. Thus, the inference, when understood in the context of its historical development, does not support Virginia's reliance upon it to prove the charge that it brought against respondent.

Traced to its origins, the unexplained possession of recently stolen property served as the basis for two different inferences: the inference that the defendant stole the property and the inference that he received the property with knowledge that it was stolen. The historical development of this "dual inference" is exhaustively traced by the Eighth Circuit in *United States v. Jones*, 418 F.2d 818 (8th Cir. 1969). As that court explained, "these inferences arose at common law because of the similar characteristics of the crimes of larceny and that of receiving stolen merchandise." *Id.* at 824 n.9.

Because the crimes of theft and receiving stolen goods were generally considered to be the same offense, many courts simply did not distinguish between the two inferences and permitted defendants to be convicted of

theft on the basis of evidence which pointed with equal force to the crime of receiving stolen goods with guilty knowledge. *Id.*; *see also* cases cited therein, *e.g.*, *Kasle v. United States*, 233 F. 878, 888 (6th Cir. 1916) ("[W]here . . . the statute so defines the act of receiving stolen property and that of stealing it as in effect to make the two offenses the same in character . . . the receipt may amount to larceny, as well as the theft; and so the same presumption arising from recent possession that would be applicable to the thief might also be to the receiver."); *Cook v. State*, 1 S.W. 254, 255 (Tenn. 1886) ("it is often difficult to determine precisely whether a party has been guilty of the larceny of the goods, or of feloniously receiving them, where there is no doubt of his guilt of either one or the other offense, and the whole case ought to be left to the jury upon proper instructions as to each").

At least by the end of the nineteenth century, several courts and commentators observed that the inference alone could not accurately distinguish between a thief and a receiver. As Burrill noted:

> The recent possession of stolen property may sometimes be referable, not to the crime of theft, but to another, though kindred offence, – that of having *received* the property with a guilty *knowledge* of its having been stolen. And, in the opinion of an able writer, there can be little doubt that persons have frequently been convicted and punished for the former offence, whose guilt consisted in the latter: a consequence which he attributes to the circumstance that real evidence, (or evidence derived from physical facts,) while truly indicative of guilt in general, may be fallacious as to the species and quality of the crime. In order to avoid the chances of such mistakes, it was suggested by the same writer, that counts for larceny should be joined with counts for receiving the goods, in the same indictment; and this practice has since become established both in England and in the United States.

Alexander Burrill, *A Treatise on the Nature, Principles and Rules of Circumstantial Evidence* 456-57 (1868) (citing W.M. Best, *A Treatise on Presumptions of Law and Fact* § 227 (1845)); *see also Reg. v. Langmead*, 10 L.T.R. (N.S.) 351 (1864) (recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the other circumstances of the case); William Wills, *An Essay on the Principles of Circumstantial Evidence* 60 (5th Am. ed. 1872) ("The difficulty of referring the act of possession specifically to [either theft or receiving] frequently led to the failure of justice. . . . ").

Where the crime of larceny was charged under theories of both larceny by theft and larceny by receiving, this failure to distinguish between the two inferences was of little practical or legal significance. *See Griffin v. United States*, 112 S. Ct. 466, 469-70 (1991) (a general verdict will support the conviction of a crime charged in the conjunctive if the evidence supports any theory of culpability that is submitted to the jury). The distinction between the inferences would be significant, however, if the prosecution proceeded on the single theory that the defendant participated in the theft. As the Supreme Court of North Carolina, in reviewing a petit larceny conviction, warned:

> But it is obvious that presumptions of this kind, which even in the strongest cases are to be warily drawn, want one of the indispensable premises to warrant them, when the possession from which a *guilty* taking is inferred does not show *a taking* or *privity in taking* on the part of the possessor . . . [and] unless there be other facts and circumstances to warrant the inference, such a presumption [of guilt of the taking] would be rash and irrational.

State v. Smith, 24 N.C. (2 Ired.) 402, 408-09 (1842).

The difficulty of determining the nature of a defendant's guilt from the simple fact of his unexplained possession of the fruits of a recent crime was perhaps best articulated by then-Judge Cardozo, writing for the New York Court of Appeals in *People v. Galbo*, 112 N.E. 1041

(N.Y. 1916). Assessing a sufficiency challenge to a second degree murder conviction, Cardozo noted that the jury in that case was entitled to find from the evidence that the defendant had possession of the victim's body, threw that body into a ravine to hide it, and falsely denied his actions. *Id.* at 1043. While the defendant's possession and concealment of the body undoubtedly justified "the inference that in some way and at some stage he became connected with this crime[,] . . . the question remain[ed]: In what way and at what stage?" *Id.*

Judge Cardozo explained the problem in the context of the two inferences arising from the unexplained possession of recently stolen goods:

> Only half of the problem, however, has been solved when guilty possession fixes the identity of the offender. There remains the question of the nature of his offense. Here again the facts must shape the inference. Is the guilty possessor the thief, or is he a receiver of stolen goods? Judges have said that if nothing more is shown, we may take him to be the thief. But as soon as evidence is offered that the theft was committed by some one else, the inference changes and he becomes a receiver of stolen goods. Sometimes the circumstances make it proper for a jury to say which inference is the true one. Learned commentators have said that in many cases the wrong inference has been drawn. *Men whose guilt was that they had received stolen property have been convicted of stealing it themselves.*

Id. at 1044 (citations omitted) (emphasis added).

Judge Cardozo acknowledged that the inference of guilt arising from the unexplained possession of the fruits of a recent crime was well-settled doctrine. *Id.* at 1044. He cautioned, however, that the sufficiency of that inference to sustain a conviction in any particular case depends upon the crime charged and all of the circumstances disclosed by the evidence. If a defendant's possession gives rise to an inference that he is guilty either as a

principal or an accessory, then "unless other circumstances are shown there is no principle of selection, aside from the presumption of innocence, to guide the choice between them," *id.*, and the factfinder "must give the defendant the benefit of the conclusion that would mitigate his guilt." *Id.*

The court then held that the inference of guilt arising from defendant's falsely explained possession and concealment of the victim's body, unsupported by any additional evidence, would have been sufficient to convict the defendant as an accessory to murder, if he had been indicted and prosecuted as such. That same evidence was simply not sufficient, however, to prove beyond a reasonable doubt that the defendant was the principal as charged. *Id.* at 1045. "In connecting him as a principal, conjecture has filled the gaps left open by the evidence, and the presumption of innocence has yielded to a presumption of guilt." *Id.*

The Eighth Circuit in *United States v. Jones*, 418 F.2d 818 (8th Cir. 1969), reached a similar conclusion under a different set of facts. In that case, the appellant had been convicted of armed robbery on the basis of his possession of bills which matched the serial numbers on "bait money" taken during a bank robbery one day earlier. *Id.* at 819. In assessing the appellant's sufficiency claim, the court noted that two alternative inferences could be drawn from his unexplained possession of the bills: (1) that appellant was guilty of knowingly possessing stolen property, or (2) that he was guilty of the robbery itself. *Id.* at 823. The court explained that when one inference is as consistent as another, "there exists a compelling evidential need for corroboration of the inference charged." *Id.* at 824. Otherwise, the "jury is actually asked to speculate which crime took place from facts which inferentially *are said* to support both." *Id.*

The court also observed that:

> Where the government's evidence is equally as strong to infer innocence of the crime charged, as it is to infer guilt, we are not dealing in the

realm of credibility, but legal sufficiency and a court has the duty to direct an acquittal.

Id. at 826.[20]

Thus, the inference, when properly understood, cannot be sufficient to sustain West's conviction. His unexplained possession of a portion of the stolen items, some two weeks after the theft in Westmoreland County, could not prove beyond a reasonable doubt that West participated in that theft. Without additional corroborative evidence to link West with the theft,[21] the jury was forced to speculate as to West's guilt of the crime charged.

2. *The jury's failure to credit West's testimony does not establish participation.*

Petitioners claim that the jury's rejection of West's testimony in this case should be construed as additional, indeed conclusive, proof of guilt. Br. Pet. 33, 35-37; Br. U.S. 23. If the jury rejects a defendant's explanation, then according to petitioners, evidence of possession of recently stolen property is necessarily sufficient to prove that the defendant was the thief. Br. Pet. 36. In petitioners' view, when the court of appeals vacated West's conviction, despite the jury's disbelief of his testimony, it (1) impermissibly supplanted the jury's credibility determination with its own subjective judgment, Br. Pet. 33, and (2) diluted the *Jackson* standard by relegating the

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[20] Then-Judge Blackmun dissented because, in his view, the inculpatory evidence presented by the prosecution was considerably more than the bare facts giving rise to the inference from unexplained possession of recently stolen money. *Jones*, 418 F.2d at 828 (Blackmun, J., dissenting).

[21] If, for example, the prosecution had presented the sort of evidence which the court of appeals noted was absent from the record – *e.g.*, "fingerprints or footprints, sightings in the vicinity, other tracings of presence, or . . . [physical indicia] at the site of discovered possession- . . . such as soil samples or the like, suggesting West's presence at the theft site" Pet. App. 14 – then the inference arising from West's unexplained possession of the stolen goods could have pointed to his guilt of larceny by participation in the theft.

credibility of the defendant's explanation to merely one factor among many. Br. Pet. 35-37. In fact, it did neither. Petitioners' argument is premised on a mischaracterization of *Jackson*.

Under the petitioners' construction of *Jackson*, a reviewing court must not only defer to the jury's disbelief of the defendant's testimony, but must necessarily imbue that discredited testimony with independent probative weight to prove all elements of the crime. This analysis fails to distinguish between the factual question of whether a defendant's possession is satisfactorily explained and the sufficiency question of whether unexplained possession, alone or in combination with other evidence, proves the necessary elements of the crime beyond a reasonable doubt.

Under *Jackson*, a jury's rejection of the defendant's explanation of his possession of stolen goods is a credibility determination which the habeas court must accept as part of its obligation to view the evidence in the prosecution's favor. *Jackson*, 443 U.S. at 319, 326. The court of appeals did, in fact, accept that credibility determination, as evidenced by its treatment of the case as one involving *unexplained* possession of recently stolen property, to which the common law inference applies. Pet. App. 17. To the extent the court below analyzed West's explanation at all, it simply inquired – out of respect for Virginia's right to have the evidence viewed in its favor – as to whether the explanation shed any additional light on the nature of West's guilt or made it any more likely that he was the thief. The court found that it did not. Pet. App. 19.

Thus, the court of appeals did not overturn the jury's determination that West's possession of the goods was unexplained or falsely denied. What the court of appeals *did* overturn was the jury's conclusion, urged by Virginia law and the petitioners' theory of the case, that West's unexplained possession of the goods proved his guilt of the Westmoreland County theft beyond a reasonable doubt. That conclusion, of course, was not a credibility determination made by the factfinder which a habeas

court was obliged to accept; rather, it was a sufficiency determination which is subject to independent review under the constitutional standard of *Jackson*.[22] *See* discussion *post* pp. 40-41.

Nor can the petitioners bolster their argument by construing West's testimony as additional evidence of guilt which lends probative weight to the inference. The inference arising from a defendant's *unexplained* possession of recently stolen property and the jury's rejection of his explanation of that possession are not independent or separable items of evidence: it is the "[a]bsen[ce of] a credible, exculpatory explanation for defendant's possession of the stolen goods" which allows the inference to be drawn in the first place. *Montgomery*, 269 S.E.2d at 353. Under Virginia law, proof that a defendant possesses recently stolen property constitutes *prima facie* evidence that the defendant is guilty of either receiving stolen goods, theft, or breaking and entering, depending on the case and the particular offense charged; such possession casts upon the defendant the burden of going forward with evidence in justification of his possession. *Brown v. Commonwealth*, 195 S.E.2d 703, 705 (Va. 1973). If the defendant either fails to go forward with any explanation at all or offers an explanation which is rejected by the jury, then, and only then, does the inference of guilt become available to the jury. *Id*.

Thus, petitioners are bootstrapping when they argue that the jury's disbelief of West's explanation can be construed as positive and independent proof that West was the thief. The jury's rejection of West's testimony

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[22] Petitioners' suggestion that the credibility of a defendant's explanation is "*the* determinative factor," Br. Pet. 36-37, to which the federal court conducting the *Jackson* sufficiency review must defer, Br. Pet. 37, does not withstand analysis. The jury's rejection of a defendant's testimony is not "all purpose" evidence of each and every element of the offense charged. If it were "all purpose" evidence of guilt, there would be no *Jackson* sufficiency review in cases where the defendant testified. Such a drastic limitation on *Jackson* ignores the fundamental due process values that *Jackson* was designed to protect and finds no support in any authority.

added no probative force to the common law inference; it merely permitted an inference of guilt to be drawn.

More importantly, while West's testimony may have suggested to a rational juror that West was lying and thus, guilty of being connected with the crime in some way and at some stage, it did not, and could not, advance the prosecution's case by the additional step of placing West at the Cardova house in Westmoreland County in December of 1978. As Judge Cardozo noted in *Galbo*: "That the defendant has lied about the crime does not prove that he must have been implicated as a principal [as opposed to an accessory]. There is a motive to falsify whatever the degree of the connection [with the crime]." 112 N.E. at 1045. While West's testimony, if disbelieved, may have lent probative force to an inference of guilty knowledge,[23] it did nothing to further the proof that he was the person who committed the theft.

Petitioners' reliance on the jury's rejection of West's testimony as additional or conclusive evidence of guilt is not supported by the authority they cite. While petitioners correctly note that the Court in *Wilson v. United States*, 162 U.S. 613, 620-21 (1896), found that a defendant's false statements may be regarded as "themselves tending to show guilt" and thus considered along with "all other circumstances of the case" to determine whether the defendant is guilty of the offense charged, the *Wilson* Court did not hold those statements to be either necessary or sufficient, in themselves, to prove his guilt beyond a reasonable doubt. It had no reason to even consider such an issue because the corroborative evidence pointed overwhelmingly to the conclusion that

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[23] Indeed, West's testimony – *e.g.*, that he purchased most of the items for the low price of $500 (J.A. 23), that he frequently bought and sold items at flea markets (J.A. 21), that many flea market goods are of questionable origin (J.A. 21), and that he could not remember the exact dates of his purchases (J.A. 25-27), or the specific items involved (J.A. 23, 27) – if not credible, provided support only for the proposition that he had received the goods with knowledge that they were stolen.

Wilson committed the murder. *Id.* at 614-16. Nor did the *Wilson* Court address the problem identified in *Galbo* of defining the nature and degree of a defendant's culpability from his disbelieved testimony when no other evidence has been presented beyond his unexplained possession of the fruits of a recent crime. *Wilson* does not stand for the proposition that a jury's rejection of the defendant's testimony can serve as positive, much less substantial, proof of the necessary elements of the offense in such cases.

The other cases cited by petitioners and amici are equally unsupportive of their position. For instance, *United States v. Restrepo-Contreras*, 942 F.2d 96 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 955 (1992), cited at Br. U.S. 23, is inapposite. In that case, the court held that discredited testimony claiming unknowing possession of drugs can lend probative force to an inference of guilty knowledge. *Id.* at 99. *Restrepo-Contreras* does not suggest, however, that the jury could also infer the manner in which defendant came to possess the drugs.

To the extent petitioners rely on the line of cases starting with *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.), which allow a reviewing court to infer guilt from negative inferences arising from demeanor evidence, Br. Pet. 37 (citing *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), they ignore the fact that this type of inference will "not remedy a deficiency in the Government's proof if one existed." *United States v. Sliker*, 751 F.2d 477, 495 n.11 (2d Cir. 1984) (citing, *inter alia*, *Dyer*, 201 F.2d at 268-69), *cert. denied*, 470 U.S. 1058 (1985). West's explanation of his acquisition of the goods, though rejected by the jury, does not supply the missing proof that West obtained the goods through participation in the Westmoreland County theft.

Finally, in *Speight v. Commonwealth*, 354 S.E.2d 95, 98 (Va. Ct. App. 1987), cited at Br. Pet. 33, the court held that the factfinder could infer from defendant's incredible testimony that he lied to conceal his guilt. It did so,

however, where defendant's account was directly controverted by the testimony of an undercover police officer. The court found that there was "both direct and circumstantial evidence that Speight organized the disposition of the stolen property, as well as evidence that he was untruthful in his account of his participation." *Id.* at 99. There was no suggestion that the jury's rejection of Speight's testimony was either necessary or sufficient to prove one or more elements of the crime.

When the inference is viewed in proper perspective, the best the jury could do in this case – and the best that any reviewing court could do – was to hazard a guess as to whether respondent was guilty of participating in the Westmoreland County theft or of the lesser offense of larceny by receiving stolen goods with guilty knowledge. As West was charged only with the former, this Court must necessarily conclude that no rational juror could find the required proof of each element of the crime beyond a reasonable doubt.

D. *The Court of Appeals' Ruling is Case-Specific and Poses No Threat to the Continued Use of the Inference.*

The amicus brief filed at the certiorari stage by the Florida Attorney General, and joined by twenty-four states, claims that the decision below threatens the use of the inference in their jurisdictions. Their apprehensions are unjustified. The decision below does not undermine the validity of the inference per se; it only concludes that the evidence giving rise to the inference is insufficient to prove guilt beyond a reasonable doubt in this specific case.

Any concern that the court of appeals' reasoning will constrain the widely accepted use of inferences is unjustified because states rarely rely on the inference alone in order to prove guilt. Florida cites thirteen cases for the proposition that the inference alone is adequate to convict. Br. Fla.I 3-4 and n.1. Yet, even these cases almost invariably contain additional incriminating evidence,

besides possession of recently stolen goods, to sustain the convictions.[24] Nothing in this brief suggests that exclusive reliance on the inference is anything but a rarity.

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[24] *See Ward v. State*, 658 S.W.2d 379, 380-81 (Ark. 1983) (defendant possessed and tried to pawn stolen property within two days of theft, fled upon questioning by police, removed the license plates from his car to conceal his identity, and implausible testimony was disproved), *habeas corpus granted sub nom. Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988) (habeas relief granted under *Jackson v. Virginia*); *Winborne v. State*, 455 A.2d 357, 359 (Del. 1982) (defendant possessed stolen property within one day of theft, stolen items hidden in chair lining at defendant's apartment and defendant admitted participation in similar burglaries); *State v. McFall*, 549 P.2d 559, 560 (Kan. 1976) (defendant had access to stolen property, admitted the theft, told others about the alibi he would use should he become a suspect); *State v. Odom*, 393 S.E.2d 146, 149-50 (N.C. Ct. App. 1990) (defendant entered a department store empty-handed, left with a plastic bag filled with clothes, hid bag outside, was unable to produce a cash register receipt for the items in the bag); *State v. Deubler*, 343 N.W.2d 380, 382 (S.D. 1984) (appellant possessed stolen truck, gave contradictory versions of how he acquired the truck, lived near the crime scene); *Miller v. State*, 563 N.E.2d 578, 581 (Ind. 1990) (defendant seen leaving victim's house carrying a radio, identified by another witness, and found in possession of stolen radio within two days of the theft); *Sutherlin v. State*, 682 S.W.2d 546, 549 (Tex. Crim. App. 1984) (evidence of possession of stolen bulldozer five months after theft *inadequate* to prove theft); *State v. Robinson*, 561 A.2d 492, 493 (Me. 1989) (codefendant testified that Robinson was the perpetrator, and stolen items were found concealed in a laundry pile at defendant's home).

Florida's cite to *State v. Chambers*, 709 P.2d 321 (Utah 1985), in this context is incorrect. *Chambers* was concerned with the appropriate phraseology of a mandatory presumption, a matter which is not at issue in this case. As the Fourth Circuit noted below, Utah requires corroboration of the inference under *State v. Heath*, 492 P.2d 978, 979 (Utah 1972) ("mere possession of stolen property unexplained by the person in charge thereof is not in and of itself sufficient to justify a conviction of larceny"). Pet. App. 12. *State v. Hong*, 611 P.2d 595, 596 (Hawaii 1980), is also inapposite because it is concerned with the lesser offense of exercising unauthorized control over the property of another.

Of all the cases Florida cites, only *State v. Brown*, 744 S.W.2d 809 (Mo. 1988) and *Jackson v. Commonwealth*, 670 S.W.2d 828 (Ky. 1984), *cert. denied*, 469 U.S. 1111 (1985), permit conviction based on possession of stolen goods alone. However, in upholding the conviction, *Brown* makes no

(Continued on following page)

Next, Florida concedes that there is a trend in many states toward requiring corroborating evidence when the inference is used, yet it insists that requiring additional evidence is not a sign of weakness. Br. Fla.I 5-6. To the contrary, the fact that many states do require corroboration supports the respondent's position that the inference does not necessarily prove guilt in all situations. Thus, there is no genuine concern that the decision of the court of appeals has wider implications for jurisdictions that recognize this inference.

IV. THE PLAIN LANGUAGE OF 28 U.S.C. § 2254, SEPARATION OF POWERS PRINCIPLES, AND STARE DECISIS MANDATE THAT *DE NOVO* REVIEW IS THE PROPER STANDARD FOR MIXED QUESTIONS.

The Court has asked the parties to brief the question of whether the standard of review for mixed questions should be *de novo* or deferential. When faced with standard of review questions in other contexts, this Court has stated that the appropriate standard is found either in a "relatively explicit statutory command" or by reviewing a "history of appellate practice." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). At least since this Court's decision in *Brown v. Allen*, 344 U.S. 443 (1953), and Congress' passage of 28 U.S.C. § 2254 in 1966, state courts' constitutional rulings on mixed questions have consistently received independent review in the federal courts. Thus, in habeas cases, *both* a statutory command and a long history of appellate practice require *de novo* review of mixed questions.

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reference to either *Jackson v. Virginia* or *Ulster County Court*, and *Jackson v. Commonwealth* only discusses these cases in the context of whether the inference impermissibly shifts the burden of proof to the defendant.

A. *The Controlling Statute Requires De Novo Review of Mixed Questions and Questions of Law.*

Congress has vested jurisdiction for plenary review of constitutional claims of state prisoners with the federal judiciary. In 28 U.S.C. § 2254, Congress distinguished factual questions from all others and specifically required deference only when the habeas courts review findings of fact.[25] Any surface appeal of treating all state rulings deferentially must therefore give way to the reality that Congress drew meaningful distinctions between questions of fact and questions of law.

The statute specifically directs:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1966).[26]

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[25] This Court recognized even before the 1966 statute:

> The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.

Townsend, 372 U.S. at 312.

[26] Amicus Criminal Justice Legal Foundation (CJLF) invites the Court to revisit the historical underpinnings of modern habeas review. Br. CJLF 2-14. Although other amici will reply, respondent will not debate the CJLF view of history. CJLF ignores the fact that *this Court* has repeatedly acknowledged that Congress adopted independent review in the 1966 structure of § 2254. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 323 (1979); *Cuyler v. Sullivan*, 446 U.S. 335, 341 (1980); *Miller v. Fenton*, 474 U.S. 104, 110-11 (1985). Congressional action renders moot the historical analysis that CJLF undertakes.

Moreover, CJLF does little more than gloss over one side of the academic debate that has been well documented for years. *Compare* Paul

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The language of subsection (a) is clear on its face. The statute gives incarcerated state prisoners a federal remedy, invoked by the prisoner's allegation of facts, which if proven, show that "he is in custody in violation of the Constitution." The *only* caveat is that the prisoner cannot obtain relief until all available state remedies are exhausted. 28 U.S.C. §§ 2254(b) and (c).

Section 2254(d) provides further support for this interpretation. In that section, Congress explicitly declared that factual findings by the state court after a full and fair hearing are presumed correct, unless one of eight statutory exemptions applies. *See* Br. Pet. 22-23 n.12. The scope of § 2254(d) includes all historical findings including those facts that bear on, *inter alia*, whether a defendant is competent to stand trial, *e.g., Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam); whether a trial juror was properly excused because of his views on capital punishment, *e.g., Wainwright v. Witt*, 469 U.S. 412, 429 (1985); or whether a juror is impartial, *e.g., Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

The § 2254(d) presumption of correctness was not included in § 2254(a), strongly suggesting that no deference was intended in § 2254(a). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.

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Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) (rejecting theory of broad plenary habeas review for all constitutional claims) *with* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 Harv. C.R.-C.L. L. Rev. 579 (1982) (supporting theory of plenary review based on historical analysis of the 1867 habeas statute). There is simply no reason for the Court to justify taking a fresh look now at this debate. No new insights have been offered by CJLF and hence, no need to revisit history.

1972). Read as a whole, § 2254 is a comprehensive statement by Congress that the federal courts must independently review habeas applications, save only for the deference required for state courts' fact-finding.

In response, petitioners offer no principled path to avoid the conclusion that the Court reached in 1979:

> Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state court convictions have been secured in accord with federal constitutional law.

Jackson, 443 U.S. at 323. Thus, review properly falls within § 2254(a) and is plenary.[27]

Moreover, even if the Court now concludes that the language of § 2254(a) is not plain, the fact that Congress did not change the statute to correct prior decisions of the Court[28] adds credence to the view that the earlier interpretation is accurate. "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us." *Teague*, 489 U.S. at 317 (White, J., concurring in the judgment); *see also Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 n.21 (1985) (Congress may correct when the Court incorrectly construes statutes); Barry Friedman, *Legal Theory: A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1, 12 (1990) ("when Congress differed with the Court, as in the case of [habeas] factfinding, Congress spoke and the Court acquiesced").

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[27] Under petitioners' construction, the statute would read as though Congress intended to provide deferential review to all questions presented in the habeas petition. It follows from petitioners' view that because questions of fact have exceptions to deference built into the statute under § 2254(d), Congress intended that these issues would receive the *least* amount of deference of the three types of questions. This anomalous result would turn the prevailing understanding of the 1966 Act upside down.

[28] *E.g.*, *Jackson*, 443 U.S. at 323; *Miller*, 474 U.S. at 113; *Sumner v. Mata*, 455 U.S. 591, 597 (1982).

Given that this Court's construction of statutes stands unless Congress intercedes, it would be inappropriate now to readdress the standard of review issue. Yet, that is precisely what amici would have this Court do. CJLF's brief expresses its frustration by baldly asserting that "this Court must retain the ability to correct its own misinterpretation of statutes, *especially where Congress is deadlocked*." Br. CJLF 20 (emphasis added). CJLF cannot so easily avoid the fact that the Court's interpretation of the statute can only be deemed a "misinterpretation" if Congress affirmatively acts to overrule it by legislation. Moreover, the Court does not exist to break congressional "deadlocks" that are in reality nothing more than a failure to secure a political majority.

B. *Separation of Powers Principles Suggest that Only Congress May Change the Standard of Review.*

Though it is clear that the Court has expressed concern with the current functioning of the habeas corpus statute, it is equally clear that Congress has its own intense interest in the statute. Neither petitioners nor their amici can deny that habeas corpus is an issue Congress has revisited time and time again. Since 1966, in spite of repeated legislative efforts to reduce the scope of the right, Congress has refused to amend the statute accordingly.[29]

Knowing that Congress is actively considering the core issue before the Court in this case, it would be inappropriate to preempt the legislature's prerogative to determine the fundamental need for habeas corpus in the federal system.[30] "Courts are not authorized to rewrite a

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[29] *See, e.g.*, S. 635, 102d Cong., 1st Sess. (1990) (barring relief on a claim that was "fully and fairly adjudicated" in state court); H.R. 1400, 102d Cong., 1st Sess. (1990) (same); S. 1760, 101st Cong., 1st Sess. 119 (1989) (reducing the scope of federal habeas relief in capital cases).

[30] The view that fundamental habeas reform is a legislative matter is widely recognized. *See, e.g.*, The Attorney General's Crime Summit: Local

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statute because they might deem its effects susceptible of improvement." *Badaracco v. C.I.R.*, 464 U.S. 386, 398 (1984); *see also McCleskey*, 111 S. Ct. at 1482 (Marshall, J., dissenting) ("It is axiomatic that this Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes."). This Court has been mindful of the separation of powers doctrine in a number of other contexts:

> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches.

TVA v. Hill, 437 U.S. 153, 195 (1978); *see also FTC v. Ruberoid*, 343 U.S. 470, 478-79 (1952) ("The Commission has repeatedly sought similar [legislative] amendment of the Clayton Act provisions involved in this case. We will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it.").

Congressional "deadlock" should not be mistaken for congressional silence or abdication of its powers in this field. "The nature, scope and continued availability of

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Control of Crime, Statement of Justice O'Connor, Washington, D.C. (March 4, 1991) at 8 ("in my view, further [habeas] reform is needed, and much of it will have to be statutory.").

Indeed, a Justice Department representative, in recent testimony stated:

> Congress responded to *Townsend* by enacting a deferential standard of review for factual determinations, and there are compelling arguments that *Congress should adopt* a similar rule of deference to state court determinations of law and the application of law to the facts.

Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 102d Cong., 1st Sess. 13 (June 27, 1991) (testimony of Andrew G. McBride) (emphasis added).

these [habeas] remedies are purely matters of statute, which are within the power of Congress to determine." *Federal Post-Conviction Remedies: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 6 (May 7, 1991) (testimony of Sen. Orrin Hatch). Questions of whether independent habeas review is necessary are fundamentally political. Congress must be allowed to decide whether independent habeas review should be abandoned.

C. *Principles of Stare Decisis Compel the Court to Continue to Use the De Novo Standard for Mixed Questions.*

This Court's decisions recognize the importance of adhering to established precedent:

> *Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991). Lacking a "special justification" to reverse a previous decision, the Court should let stand the long line of cases supporting the use of a *de novo* standard of review for mixed questions of fact and law. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("any departure from the doctrine of *stare decisis* demands special justification").

1. *This issue has been settled by a long line of precedent.*

Consistent with the language of the statute, and mindful of the legislative function, this Court has repeatedly held that federal habeas courts must give *de novo* review to state courts' constitutional rulings on mixed questions. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (evaluation of voir dire testimony of impaneled jurors to determine impartiality); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (voluntariness of a confession); *Neil v. Biggers*, 409 U.S. 188, 193, 199 (1972) (whether station house identification by victim was overly

suggestive); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (waiver of right to assistance of counsel); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (sufficiency of the evidence); *Rose v. Mitchell*, 443 U.S. 545, 561 (1979) (discrimination in selection of grand jury members); *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980) (whether retained defense counsel labored under an impermissible conflict of interest); *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982) (per curiam) (whether pretrial identification procedures were proper); *Marshall v. Lonberger*, 459 U.S. 422, 430 (1983) (whether a guilty plea was voluntary); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam) (whether constitutional error involving *ex parte* contact between juror and judge was harmless); *Strickland v. Washington*, 466 U.S. 668 (1984) (whether defense counsel provided effective assistance); *Miller v. Fenton*, 474 U.S. 104, 116-18 (1985) (voluntariness of confession); *Francis v. Franklin*, 471 U.S. 307, 314 (1985) (whether jury instruction created mandatory presumption that satisfied intent element for criminal conviction); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (whether death penalty was properly imposed without consideration of mitigating factors); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (whether jury instructions in death penalty case satisfied statutory aggravating circumstances test under the Eighth Amendment); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (absence of jury instructions directing jurors to consider mitigating evidence in sentencing phase of capital case); *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102-04 (1990) (whether due process was violated in application of statutory aggravating circumstances); *Estelle v. McGuire*, 112 S. Ct. 475, 481-82 (1991) (whether admission of expert testimony of prior injury was probative on question of intent).

When, as here, the Court has repeatedly determined that congressional intent in a given statutory scheme is clear, it is particularly important to follow principles of stare decisis. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

Furthermore, not only does a long line of relevant, analogous precedent support *de novo* review, but this Court's decision in *Jackson v. Virginia* squarely decided that *de novo* review is an appropriate standard for sufficiency questions.[31] The United States attempts to diminish the significance of overruling *Jackson* because that Court viewed the habeas court's role "as no different" than in a direct appeal. Br. U.S. 19. However, *Jackson* cannot be so easily disregarded. The foundation for *de novo* review in the *Jackson* decision is built on the importance of the "basic question of guilt or innocence." 443 U.S. at 323. The "no rational juror" standard employed is sufficiently narrow that further restriction of collateral review was deemed unnecessary. The *Jackson* Court was well aware of the difference between habeas and direct review when it reached its decision. *Jackson* was decided three years after *Stone v. Powell*, 428 U.S. 465 (1976), a ruling which clearly articulated the Court's concerns about the proper confines of federal habeas review. *See* 428 U.S. at 475-82. The *Jackson* majority explicitly declined to include sufficiency claims under the limits identified in *Stone*. *Jackson*, 443 U.S. at 321. Ultimately, it is impossible to avoid the conclusion that reversing the standard of review to require deference for mixed questions generally, or *Jackson* claims specifically, would unduly impair the "reasonable

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[31] A *Jackson v. Virginia* case is not a proper vehicle for changing to a deferential standard of review. Unlike other mixed question decisions, *Jackson* has substantial deference built into its substantive review standard. The *Jackson* standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. . . . [and] impinges upon 'jury' discretion *only to the extent necessary to guarantee the fundamental protection of due process of law.*" *Jackson*, 443 U.S. at 319 (emphasis added). Heightened deference to decisions made under the already deferential *Jackson* standard would be either redundant, or would fundamentally alter the substantive guarantee promised by *In re Winship*, 397 U.S. 358 (1970), that no person shall stand convicted except on proof beyond a reasonable doubt.

predictability"[32] upon which the federal courts and litigants must be able to rely.

2. *There are no compelling reasons to revisit the issue.*

Petitioners offer two justifications for shifting to deferential standard of review, neither of which is a compelling reason to warrant overturning so much precedent. Petitioners first assert that the difficulty of distinguishing between questions of "pure law" and mixed questions of fact and law justifies using a single standard of review by federal courts. Br. Pet. 15 n.8. Their argument fails to recognize that this Court uses these distinctions to determine the appropriate standard of review for a wide variety of statutory and constitutional questions. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Though perhaps difficult to apply in some instances, the Court has never suggested that the determination of the appropriate standard of review could be ascertained in another, simpler fashion.

In the habeas context, the Court has always recognized that Congress deliberately used these distinctions to limit the power of the habeas court to redetermine factual findings of the state courts. For example, in *Miller*, while acknowledging the difficulty of establishing an "appropriate methodology for distinguishing questions of fact from questions of law. . . . ," 474 U.S. at 113, the Court understood that § 2254(d) compelled it to determine whether voluntariness findings were subject to the

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[32] In the previous capital punishment cases . . . the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts and appellate courts must of necessity rely has been all but completely sacrificed.

Lockett v. Ohio, 438 U.S. 586, 628-29 (1978) (Rehnquist, J. concurring in part and dissenting in part) (citations omitted).

presumption of correctness.[33] The *Miller* Court's conclusion that it was not easy to decide the issue analytically did not prevent it from reaching a principled decision. The decision that " 'voluntariness' is a legal question" was the end result of "considerations of stare decisis and congressional intent [plus] the nature of the inquiry itself. . . . " 474 U.S. at 115.

Moreover, reference to the problems identified in *Miller* are not availing here because there is no problem determining whether sufficiency claims are subject to § 2254(d) deference. That issue has not even been raised by petitioners.[34]

Petitioners stress concerns of "finality, comity and federalism" as a second reason for a deferential standard of review for mixed questions in federal habeas courts, Br. Pet. 9, but offer no new concerns of federalism that were not squarely presented to, and rejected by, the *Jackson* Court. *See* 443 U.S. at 321. Concerns of federalism are admittedly important, however, this Court has taken many steps to accommodate those needs over the past fifteen years while always respecting the basic statutory scheme for habeas review. *See Stone v. Powell*, 428 U.S. 465 (1976) (barring exclusionary rule claims from habeas litigation where full and fair litigation of the issue at the state court has occurred because the exclusionary rule is not constitutionally required); *Teague*, 489 U.S. at 316 (applying "new rule" doctrine to ensure equal treatment of habeas and direct review petitioners); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (requiring a showing of "cause and prejudice" resulting from a procedural default before a constitutional claim may be adjudicated by a federal habeas court); *McCleskey v. Zant*, 111

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[33] The *Miller* decision is one in a long line of decisions where the Court was called on to determine whether a question presented for review was entitled to the presumption of correctness under § 2254(d). *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 427-28 (1985); *Patton v. Yount*, 467 U.S. 1025, 1037 (1984).

[34] Petitioners also claim that under *Teague*, questions of law are no longer accorded *de novo* review under the habeas statute and that mixed questions must be treated in the same manner. That issue is addressed elsewhere in this brief. *See post* pp. 44-49.

S. Ct. 1454, 1470 (1991) (applying the "cause and prejudice" standard to the abuse of the writ doctrine to limit successive federal habeas corpus petitions); *Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991) (requiring a showing of "cause and prejudice" or proof that a "fundamental miscarriage of justice" will occur by failure to consider claim in habeas that was procedurally defaulted in state court). In these decisions, the Court never altered the statutory independent review requirement. Rather, the Court exercised its authority to determine prisoner entitlement to *any* federal habeas review.[35] In this context, the Court has carefully addressed the federalism concerns of petitioners and their amici. Any need for yet further retrenchment through reinterpretation of the fundamental meaning of the statute is a matter that must be left to Congress.

V. THIS COURT'S RECENT RETROACTIVITY DECISIONS ARE CONSISTENT WITH THE STATUTORY REQUIREMENT THAT HABEAS COURTS CONDUCT *DE NOVO* REVIEW OF QUESTIONS OF LAW AND MIXED QUESTIONS OF LAW AND FACT.

Petitioners assert that the cases establishing independent review of mixed questions were overruled *sub silentio* by this Court's decisions in *Teague v. Lane*, 489 U.S. 288 (1989), *Butler v. McKellar*, 494 U.S. 407 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990). Br. Pet. 11-19. They base their argument on perceived inconsistencies in the two lines of authority. There is, however, no inconsistency to be reconciled. Post-*Teague*, this Court has applied *de novo* review to mixed questions in *Lewis v. Jeffers*, 110 S. Ct. 3092, 3102-04 (1990), and *Estelle v.*

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[35] "[H]abeas corpus filings per state prisoner remained fairly constant from 1945 to 1962, rose dramatically until 1970 and have steadily declined since . . . [to] 1.85 [federal habeas corpus petitions per hundred state prisoners] in 1988." Charles Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. Rev. 131, 162-63 (1990).

Federal courts are not now overburdened with habeas hearings. "In 1988, only 1.11 percent of the habeas corpus petitions received evidentiary hearings, compared with 5.03 percent of all other civil cases." *Id.* at 167. Of course, this data precedes *Teague*.

McGuire, 112 S. Ct. 475, 481-82 (1991). The United States dismisses the continued use of *de novo* review because no party brought the standard of review issue to the Court's attention in those cases. Br. U.S. 21 n.10. The more reasonable view is that this Court did not consider its retroactivity decisions relevant to a determination of the appropriate standard of review in those cases.

A. *The Cases Following Teague Are Consistent With the Standard of Review Decisions of this Court.*

Though the Court's recent retroactivity decisions have certainly affected the scope of habeas review, they do not alter the fundamental plenary nature of that review. *Teague* created a structure by which a federal habeas court's plenary power would be confined to applying the settled law that was in place when the conviction was finalized. 489 U.S. at 310. Nothing in *Teague* or later cases alters the requirement that federal habeas courts conduct *de novo* review to determine whether the habeas applicant's rights were violated under that *settled* law.

Teague can only be understood by considering the harm it corrected: It protected state court convictions from being overturned by federal courts applying new rules developed after the state court ruling. 489 U.S. at 305. *Teague* also resolved the difficulties encountered by application of *Linkletter v. Walker*, 381 U.S. 618 (1965), the most important of which was the possibility of inconsistent results leading to "disparate treatment of similarly situated defendants on direct review." 489 U.S. at 303.[36]

To achieve its purpose, the Court prohibited federal courts from applying "new rules" on habeas review. 489 U.S. at 310. *Teague* is a rule of nonretroactivity that is

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[36] The Court illustrated the problem by reference to the result in *Johnson v. New Jersey*, 384 U.S. 719, 733-35 (1966). There, under the *Linkletter* standard, "the Court's refusal to give *Miranda* retroactive effect resulted in unequal treatment of those who were similarly situated." *Teague*, 489 U.S. at 303.

consistent with the statutory structure of independent habeas corpus review. After *Teague*, a federal court must provide a habeas petitioner with the same – but no more – relief than he would have received if his federal review took place before his state conviction became final. *Teague* does not alter the degree of deference applied in habeas review.

Petitioners nevertheless assert that *Butler* and *Saffle* extended the *Teague* doctrine "beyond an ordinary concept of non-retroactivity." Br. Pet. 18. Petitioners conclude that a federal habeas court must now accept a state court's interpretation and application of constitutional law "unless the merits of [the] claim were so clear at the time of the state court decision that no reasonable jurist could have rejected it." Br. Pet. 18. This reading of *Butler* and *Saffle* is unreasonable.

To be sure, both *Butler* and *Saffle* conclude that the new rule principle validates "reasonable, good faith interpretations of existing precedents." *Butler*, 494 U.S. at 414; *Saffle*, 494 U.S. at 488. Petitioners, however, ignore what the Court clearly recognized: reasonable interpretations of law could only be "validated" if habeas courts could conduct the plenary review required by § 2254(a). Surely, if the *Teague* Court thought deference to state court constitutional rulings could be achieved in a more direct and simple fashion, such as ignoring the statutory requirements, it would have done so.

The new rule principle only restricts the habeas court from granting the writ if it concludes that the basis for its decision was not compelled under the "constitutional standards that prevailed at the time the original proceedings took place." 489 U.S. at 306 (citing *Desist v. United States*, 394 U.S. 244, 262-63) (1969) (Harlan, J., dissenting)). To ensure that precedent is not extended, the Court looks to see if the rule urged by the habeas applicant was being debated in the lower courts when it was decided in state court. If it was subject to debate, the rule is a new one for *Teague* purposes because it was not settled law. *Butler*, 494 U.S. at 415.

The *Teague* test is not deferential, but objective. Habeas courts can apply the "new rule" test even if the state court did not issue a written opinion. The habeas court looks to the

established federal law at the relevant time and applies that law. *See, e.g., Saffle*, 494 U.S. at 489. This is precisely what the court of appeals did here. It applied the law in effect – namely, *Jackson* and *Ulster County Court* – at the time the conviction became final.[37]

B. *Deferential Review of Mixed Questions Is Not a Logical Extension of Teague.*

While the United States, as amicus curiae, does not go so far as to claim that *Teague* decided the standard of review question posed by the Court, it does argue that continued use of *de novo* review for mixed questions is "incongruous" given that *Teague* requires the habeas court "to defer to state court legal conclusions" of "pure law" determinations and the statute itself requires deference to factual findings. Br. U.S. 16 n.6. The United States concludes that there is no distinguishing feature to justify a different standard of review for mixed questions. Br. U.S. 16-18.

This argument, however, is based on a faulty premise. *Teague* does not require federal courts to defer to state court determinations on questions of "pure law."[38] It only

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[37] Petitioners complain here that the court of appeals made a "judgment call" that the evidence in this case was insufficient. Br. Pet. 26. This objection misses the point. While it is true that the ruling below was a judgment call, the court of appeals correctly noted that judgment was *compelled* by the *Jackson* standard: "Application of the *Jackson v. Virginia* due process test . . . is necessarily an evidence-specific judgment call." Pet. App. 13. That the decision of a court of appeals under *Jackson* may have been a "judgment call," however, does not suggest that *Jackson* was incorrectly applied. Regardless of the standard of review, any decision to reverse or affirm in a close case may be a judgment call. This quality certainly does not connote retroactive application of new law and does not violate *Teague*.

[38] Thus, the United States, in recent congressional hearings has noted:

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fixes in time the "pure law" that applies to the habeas case before the court. Thus, the habeas applicant is entitled to no better interpretation of the law than he would have received upon certiorari review of the state court judgment. This new rule concept operates in mixed question situations by preventing the habeas court from applying new legal principles developed after the state conviction became final. New developments in the law would not be applied by the federal court when deciding a mixed question presented by the habeas petition.

The deferential review of mixed questions proposed by petitioners is, if anything, inconsistent with *Teague*. The primary purpose of the *Teague* rule is to ensure that the habeas applicant gets *no more* protection than he was entitled to when the state court adjudicated his constitutional claim. 489 U.S. at 306. *Teague*, however, does not seek to ensure that the habeas applicant gets something decidedly *less* from the habeas court than he was entitled to under settled law. "[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated. . . . " 489 U.S. at 315. Under the rule advanced by petitioners and amici, habeas applicants who are "reasonably" denied constitutional rights under settled law will not receive the benefit of those rights, while those who are denied rights "unreasonably" under settled law will get the benefit.

Thus, the elimination of any independent review raises obvious problems of disparate treatment for similarly situated habeas applicants, the precise evil that *Teague* sought to

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> Congress has already mandated that factual determinations of state courts arrived at in full and fair proceedings should not be overturned unless the habeas petitioner can demonstrate by clear and convincing evidence that the state court determination was erroneous. 28 U.S.C. § 2254(d). Yet, under present law, the legal determinations of state courts are entitled to no weight at all in a federal habeas corpus proceeding.

Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 102d Cong., 1st Sess. 19 (June 27, 1991) (testimony of Andrew G. McBride).

remedy. 489 U.S. at 305 ("the [previous] standard also led to unfortunate disparity in the treatment of similarly situated defendants on collateral review"); *accord James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2440 (1991) (declaring that in the civil context, "similarly situated litigants should be treated the same") (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)). Petitioners' rule of deference undermines consistent enforcement of constitutional law, and induces the harm the *Teague* Court sought to avoid. It is, therefore, simply wrong to say that *Teague* is a rule for "pure law" questions that should be extended to mixed law questions in the name of "symmetry." Br. U.S. 13.

C. *Deferential Review is Not a Workable Rule.*

The United States complements its "symmetry" argument with a claim that its proposed standard is a readily workable rule. Br. U.S. 15. This proposition is dubious. Ease of application assumes that the habeas court will be able to readily identify the state's reasons for its decision and, once found, that these reasons will provide a clear, complete and accurate exposition of the relevant federal law.[39] Certainly the Court's experience with the "independent and adequate state grounds" rule suggests that the habeas court's review

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[39] Identification of the state's reasoning would be difficult in this case. Based on the state record, the federal habeas court would have to defer to the following rulings:

"THE [TRIAL] COURT: We overrule the motion [to strike the evidence]." J.A. 19.

"THE [TRIAL] COURT: We overrule the [renewed] motion [to strike the evidence]." J.A. 30.

"THE [TRIAL] COURT: We will overrule that motion [to strike the evidence and set aside the verdict]." J.A. 36.

"*In the Supreme Court of Virginia*. . . . Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case." J.A. 41.

"*In the Supreme Court of Virginia*. . . . Upon a Petition for a Writ of Habeas Corpus. . . . Applying the rule in . . . *Hawks v. Cox*, 211 Va. 91, 175

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of the state record will not always be easy or fruitful. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("plain statement" rule adopted to promote clearer state court rulings). Moreover, even if the state court articulates the basis for its decision, the habeas court will first be required to determine whether the state court's ruling reflects a correct understanding of the governing constitutional principles before it can defer to the application of those principles for a given set of facts. *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) ("[w]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue").

Thus, the habeas court will be required to determine the accuracy of the constitutional test applied before it can determine what standard of review to use. The body of law that will develop from this preliminary ruling will likely track the problems of the "plain statement" decisions. Moreover, this will result in two classes of review: (1) *de novo* review if there is no articulation of a constitutional standard, or if the state court ruling is incomplete or inaccurate; and (2) deferential review if the correct standard is used by the state court. This is not a "workable" rule.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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S.E.2d 271 (1970), [holding that habeas petitioner is not entitled to consideration of previously adjudicated claims] to petitioner's allegations 1, 2, 3, 4 and 5 . . . the Court is of [the] opinion that the writ of habeas corpus should not issue as prayed for." J.A. 48.

APPENDIX

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed

to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.